

FLIGHTWATCH

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PILOTS' BILL OF RIGHTS PASSES SENATE BY UNANIMOUS CONSENT

I. A Big Step

The Pilots' Bill of Rights sponsored by Senator James Inhofe (S. 1335) passed the Senate by unanimous resolution on Friday, June 29, 2012. The legislation sponsored by Senator Inhofe is a giant step in restoring fairness to pilots in the aviation enforcement system which has historically afforded deference to the FAA. While the FAA bears the burden of proof, for many years, applicable law has required that the NTSB defer to the FAA's validly adopted and publicly available interpretations of its regulations. The net effect of this legal posture has been to diminish the obligation of the FAA to carry its burden of proof and undermine the ability of an airman to mount a meaningful defense. A more complete discussion of this problem appears in "Call for a Congressional Inquiry into the Arbitrary and Capricious Decisions of the National Transportation Safety Board," A. Armstrong, *75 Journal of Air, Law and Commerce* 3 (2010). In that article, the author of *Flightwatch* demonstrated, by citing a number of cases, that the burden of proof imposed on the FAA had been weakened by statutory language requiring the National Transportation Safety Board to defer to the FAA's interpretations of its rules and regulations. See, e.g., 49 U.S.C. §44709(d)(3) that declares, *inter alia*, that: "...the Board is not bound by the findings of fact of the Administrator, but is bound by all validly adopted interpretations of laws and regulations the Administrator carries out, and of written agency policy guidance available to the public..."

In contrast to the deference provisions, the NTSB Rules of Practice have provided: "In proceedings under Section 609 of the Act, the burden of proof shall be upon the Administrator." 49 CFR §821.32. While the Board's Rules of Practice have declared that the FAA carries the burden of proof, the statutory requirements of deference have weakened and diminished the obligation of the Administrator to prove his case. The Pilots' Bill of Rights, if passed and signed into law, may restore the balance of power that should exist in a fair enforcement system. Besides restoring a semblance of fairness in aviation enforcement proceedings, the Pilots' Bill of Rights has other elements that will be discussed in this article.

II. The Federal Rules of Civil Procedure and the Federal Rules of Evidence

Under §2(a) of the Pilots' Bill of Rights, the Federal Rules of Civil Procedure and the Federal Rules of Evidence will be applicable "to the extent practicable." With all due respect, the words "to the extent practicable" should be eliminated from the Bill when it makes its way to the House of Representatives. There is no reason why the Federal Rules of Civil Procedure or the Federal Rules of Evidence should not be applied in aviation enforcement proceedings before the NTSB. All this language does is weaken the impact of this vital piece of legislation.

Historically, the Board has allowed hearsay and even double hearsay into evidence. Hearsay is a statement made out of court by a person who is not under oath. Because the statement is made out of court and not under oath, it is not possible for the airman or his lawyer to cross-examine the declarant (the person making the statement). The Board's admission of hearsay has allowed the FAA to avoid cross-examination of its witnesses. This practice, together with the imbalance in the burden of proof discussed above, has created a system that has been fundamentally flawed and unfair to pilots. Applying the Federal Rules of Civil Procedure and the Federal Rules of Evidence will ensure fairness and uniformity in aviation enforcement proceedings if the judges who administer the law follow and apply these rules.

III. Timely Access to Information

The practice of law boils down to two things: (1) the control of information, and (2) intimidation. The party who controls the information intimidates the party who does not. This is why “discovery” in cases is so vital to a just outcome of the case. If one party is allowed to hide the ball and keep evidence from the other party that would cause the withholding party to lose his case if it were disclosed, then a just outcome at trial will not be achieved. Accordingly, an airman who receives a letter of investigation is, according to Section 2(b) of the Pilots’ Bill of Rights, to be advised: (1) as to the nature of the investigation, (2) the fact that a written or oral response is not required, (3) the fact that there can be no action adverse to the airman taken if the airman declines to respond, (4) that any response to a letter of investigation may be used as evidence against the airman, (5) the releasable portions of the enforcement investigative report are (EIR) available to the airman, and (6) provide the airman with access to air traffic data. See Section 2(b)(1), (2)(A), (B), (C), (D), (E) and (F) of the Pilots’ Bill of Rights. However, the Pilots’ Bill of Rights does have an exception that will allow the FAA to delay timely notification “if the Administrator determines that such notification may threaten the integrity of the investigation.” See Section 2(b)(3) of S.1335. Just like the language in the Bill giving latitude as to whether the Federal Rules of Civil Procedure and Federal Rules of Evidence will be applied, giving the FAA the discretion not to give timely notification to the airman threatens the integrity and fairness of the process.

The proposed Pilots’ Bill of Rights shall afford the airman (subject to the exception noted above) access to ATC communication tapes, radar information, air traffic controller statements, flight data, investigative reports and other air traffic or flight data. See Section 2(b)(4)(A), (B)(i), (ii), (iii), (iv), (v), (vi). While there have been problems in obtaining information from government contractors acting on behalf of the FAA such as Lockheed Martin, Section 2(b)(4) (C) will require that government contractors provide the data to the Administrator and require the Administrator, in turn, to provide the requested information to the airman. See Section 2(b)(4)(C)(i),(ii),(iii), S. 1335.

IV. The FAA’s Burden of Proof Restores?

As noted above, while Section 821.32 of the Board’s Rules of Practice declares that the FAA bears the burden of proof, a number of statutes applicable in aviation enforcement proceedings have recited that the NTSB is required to defer to the FAA’s validly adopted and publicly available interpretation of regulations. To that end, the deference language found in those statutes is rescinded in Section 2(c) of the Pilots’ Bill of Rights. See e.g., Section 2(c) of S.1335 that deletes the deference language found in 49 USC §§44703(d)(2), 44709(d)(3), 44710(d)(1).

V. New Appeal Rights to Federal District Court

Historically, the airman litigates his case in an administrative law system administered by the NTSB. The hearings are conducted before a hearing officer who is called an “administrative law judge.” The hearing officer makes findings of fact and conclusions of law after hearing the evidence. This means that the hearing officer or administrative law judge serves as both judge and jury.

The airman can then appeal the decision of the hearing officer to the five members of the National Transportation and Safety Board who are appointed by the President. The five members of the NTSB typically are not lawyers and they rely upon their legal staff to write decisions disposing of the airmen’s appeals. The airman may spend years in an administrative system before he ever gets to a courthouse. The first time he gets to a courthouse, he will find himself before a United States Court of Appeals either for the circuit where he resides or the U.S. Court of Appeals for the District of Columbia. Prosecuting an appeal to the United States Court of Appeals is not an inexpensive undertaking.

Section 2(d) of S.1335 will now allow an airman who has obtained a final decision from the NTSB or from the FAA to appeal to a Federal District Court either in the district where the airman resides or in the United States District Court for the District of Columbia. If the airman decides not to pursue an appeal in the United States District Court, he may still file an appeal in an appropriate United States Court of Appeals. See Section 2(d) (1), S.1335.

If the case is an emergency action, then the emergency order shall remain in effect pending the exhaustion of the appeal to the Federal District Court. Section 2(d)(2), S.1335.

The scope of review available in Federal District Court is not the same as the scope of review available in a United States Court of Appeals. For example, in a proceeding before a United States Court of Appeals, the scope of review is found in 5 U.S.C. §706 that allows for the appellate court to strike down the decision of the NTSB if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law or contrary to constitutional right, power, privilege or immunity.” See U.S.C. §706(2)(A), (B). Historically, the position of the United States Courts of Appeals with regard to scope of review has been to defer to the NTSB because the members of the NTSB are presumed to be experts in the field (of aviation law). However, the Pilots’ Bill of Rights may warrant the seasoned aviation practitioner recommending to this client that the appeal be lodged with a United States District Court rather than a United States Court of Appeals since: “in a United States District Court, the District Court shall give full independent review of a denial, suspension, or revocation ordered by the Administrator, including substantive independent and expedited review of any decision by the Administrator to make such order effective immediately.” See Section 2(e)(1), S.1335. Moreover, the evidence to be considered by the Federal District Court will include a review of “hearing testimony, transcripts, exhibits, decisions, and briefs submitted by the parties.” See Section 2(e)(2), S.1335.

The language in the Pilots’ Bill of Rights suggests that a United States District Court may give a more detailed and less deferential scope of review to a proceeding appealed from the NTSB than would be available before a United States Court of Appeals. For this reason, aviation lawyers may recommend to their clients that appeals from decisions of the NTSB be lodged not with a United States Court of Appeals but with a United States District Court.

VI. Notices of Airman Information

Section 3 of S.1335 deals with an effort to improve the system of providing NOTAMs to pilots “to decrease the overwhelming volume of NOTAMs an airman receives when retrieving airman information prior to a flight in the National Airspace System. Section 3(b)(2), S.1335. Furthermore, the proposed

VII. Medical Certification

The final section of S.1335 deals with medical certification. Section 4 of S.1335 requires the Comptroller General of the United States to initiate an assessment of the FAA’s medical certification process and Medical standards and forms. See Section 4(a)(1), S.1335. The Comptroller General is required to submit a report to Congress based on the assessment discussed above that examines revisions to the medical application form that would make the form more clear and alignment of medical qualification policies consistent with present day qualified medical judgment and practices. See Section 4(a)(2)(A), (B), S.1335. One of the goals of the medical certification process is to “avoid unnecessary allegations that an individual has intentionally falsified answers on the (medical application) form.” See Section 4(b)(1)(B), S.1335. As was the case with the NOTAM issue, pilot groups are to make recommendations together with aviation medical examiners to the Administrator in carrying out the goals of improving medical certification standards and the clarity of the questions on the medical application form. See Section 4(c), S.1335. The Administrator is required to take action on the report generated by the Comptroller General not later than one year after the issuance of the Comptroller General’s report.

112TH CONGRESS
2^D SESSION

S. 1335

AN ACT

To amend title 49, United States Code, to provide rights
for pilots, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*

2 *tives of the United States of America in Congress assembled,*

VIII. Conclusion

Senator Inhofe is to be applauded for pushing the Pilots' Bill of Rights through the United States Senate. Not only was it passed by unanimous consent resolution, but S.1335 has 65 co-sponsors. This means roughly two thirds of the members of the Senate have backed the Pilots' Bill of Rights.

On information and belief, the Pilots' Bill of Rights could be before the House of Representatives as early as July 2012.



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